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SUPREME COURT, U.S.

No. 02-811

FEB 11 2003

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

JEFF GROH, Special Agent with the
Bureau of Alcohol, Tobacco, and Firearms,

Petitioner,

v.

JOSEPH R. RAMIREZ, JULIA L. RAMIREZ,
JOSHUA RAMIREZ, and REGINA RAMIREZ,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit properly ruled that a law enforcement officer violated clearly established law, and thus was personally liable in damages and not entitled to qualified immunity, when at the time he acted there was no decision by the Supreme Court or any other court so holding, and the only lower court decisions addressing the issue had found the same conduct did not violate the law?

2. Whether law enforcement officers violate the particularity requirement of the Fourth Amendment when they execute a search warrant already approved by a magistrate judge, based on an attached application and affidavit properly describing with particularity the items to be searched and seized, but the warrant itself does not include the same level of detail?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

REPLY BRIEF FOR PETITIONER 1

I. THE PARTICULARITY ISSUES UNDER THE FOURTH AMENDMENT HERE ARE CLEANLY PRESENTED AND WARRANT REVIEW 1

II. THE RULING BELOW DISREGARDS SETTLED PRINCIPLES OF QUALIFIED IMMUNITY AND DEPARTS FROM COURT PRECEDENT 7

CONCLUSION 10

TABLE OF AUTHORITIES

PAGE

Cases

Anderson v. Creighton, 483 U.S. 635 (1987) 9
Behrens v. Pelletier, 516 U.S. 299 (1996) 10
Bartholomew v. Pennsylvania,
221 F.3d 425 (3d Cir. 2000) 5, 6, 9
Christopher v. Harbury, 122 S. Ct. 2179 (2002) 6
County of Sacramento v. Lewis, 523 U.S. 833 (1998) .. 6, 10
Guerra v. Sutton, 783 F.2d 1371 (9th Cir. 1986) 8
Hanlon v. Berger,
526 U.S. 808 (1999) (per curiam) 9
Harlow v. Fitzgerald, 457 U.S. 800 (1982) 7
Hunter v. Bryant,
502 U.S. 224 (1991) (per curiam) 10
Malley v. Briggs, 475 U.S. 335 (1986) 9
Marks v. Clarke, 102 F.3d 1012 (9th Cir. 1996) 9
Massachusetts v. Sheppard, 468 U.S. 981 (1984) 5, 6, 7
Procunier v. Navarette, 434 U.S. 555 (1978) 7
Saucier v. Katz, 533 U.S. 194 (2001) 9, 10
United States v. Beaumont, 972 F.2d 553 (5th Cir. 1992),
cert. denied, 507 U.S. 1054 (1993) 5
United States v. Cherna, 184 F.3d 403 (5th Cir. 1999),
cert. denied, 529 U.S. 1065 (2000) 4
United States v. Curry,
911 F.2d 72 (8th Cir. 1990) 2, 3
United States v. Dahlman,
13 F.3d 1391 (10th Cir. 1993) 3
United States v. Kow, 58 F.3d 423 (9th Cir. 1995) 8
United States v. Leon, 468 U.S. 897 (1984) ..... *passim*
United States v. Luk, 859 F.2d 667 (9th Cir. 1988) 8
United States v. McGrew,
122 F.3d 847 (9th Cir. 1997) ..... *passim*
United States v. Shugart, 117 F.3d 838 (5th Cir.),
cert. denied, 522 U.S. 976 (1997) 4, 5

TABLE OF AUTHORITIES
(continued)

PAGE

Cases

United States v. Simpson,
152 F.3d 1241 (10th Cir. 1998) 4
United States v. Thomas, 263 F.3d 805 (8th Cir. 2001),
cert. denied, 534 U.S. 1146 (2002) 2, 3
United States v. Towne,
997 F.2d 537 (9th Cir. 1993) 8
Wilson v. Layne, 526 U.S. 603 (1999) 7, 9

Constitutional Provisions, Statutes, and Rules

U.S. CONST. amend. IV ..... *passim*
S. Ct. R. 10(c) 6

REPLY BRIEF FOR PETITIONER

This case cleanly presents a constitutional issue on which the circuit courts are divided and on which the Ninth Circuit has departed from the Court's precedents. The constitutional issue here is whether law-enforcement officers who properly obtain a warrant will be held to a constitutional violation, outside the bounds of the "good faith" doctrine, when the warrant is insufficiently particular and the supporting documentation is not presented when the warrant is executed. In addition, the Ninth Circuit has continued its repeated pattern of stubbornly ignoring the Court's teachings about how to resolve issues of qualified immunity – an area where this Court has tried in the past to exert control over the Ninth Circuit's waywardness by means of summary reversals, *per curiam* rulings, and decisions on the merits. Aside from rearguing the facts,[1] respondents barely address these points; to the extent they seek to deny any conflict among the lower courts, their discussion is incomplete and unpersuasive. For these reasons, as amplified below, either summary reversal or plenary review is warranted here.

I. THE PARTICULARITY ISSUES UNDER THE FOURTH AMENDMENT HERE ARE CLEANLY PRESENTED AND WARRANT REVIEW.

The circuit courts of appeals are divided on the specific constitutional issue that underlies the defense of qualified immunity raised in this case: whether law enforcement officers violate the particularity requirement of the Fourth Amendment and leave themselves outside the bounds of the "good faith"

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[1] Respondents claim that petitioner "grossly mischaracterizes the facts of this case." Opp. 1. This claim is made without citation, and no actual misstatement of fact is ever quoted. Respondents assert repeatedly that there was "no application or affidavit attached to the warrant in this case," *id.*; *see also id.* at 3, 4, 8, which is only half-true. No affidavit was attached to the warrant when it was served – and petitioner has never claimed otherwise – but an affidavit was attached to the warrant when it was submitted to and approved by the magistrate. The district court placed those documents under seal, and the relevant portions were transmitted to respondents immediately when their attorneys requested them. *See* Pet. 3-4.

doctrine when they execute a warrant that was approved by a court based on an attached application and affidavit that are sufficiently particular, but where the warrant itself does not contain the same level of detail.

Respondents make a passing effort to dispel any circuit conflict, *see* Opp. 8-10, but their account of the lower court decisions is inadequate and incomplete. Their breezy claim that all of the other cases involved warrants that were "cured" by affidavit, *see id.* at 7-8, is demonstrably mistaken. At bottom, they seek to distinguish other circuit cases on irrelevant factual grounds that do not bear on the pertinent constitutional issues, such as the fact that the search in those cases did not involve "a two story blue house," unlike this one. *See id.* at 6, 8, 10.

For example, in discussing the Eighth Circuit's approach, respondents recount certain facts, but never explain how those facts are supposed to distinguish those cases from this one. In fact, both *United States v. Curry*, 911 F.2d 72 (8th Cir. 1990), and *United States v. Thomas*, 263 F.3d 805, 808-09 (8th Cir. 2001), *cert. denied*, 534 U.S. 1146 (2002), are squarely in conflict with the decision below. In *Curry*, the officer made a clerical error that caused the warrant to omit any address or description of the place to be searched whatsoever. As in this case, the warrant was therefore defective on its face for lack of particularity, even though the information contained in the original affidavit was correct. As in this case, the affidavit was not referenced in the warrant, and so did not provide a basis for curing the particularity defect under the Fourth Amendment. *See Curry*, 911 F.2d at 76-77. Indeed, the upshot was that in *Curry*, as in this case, the magnitude of the error which the officer had made – which caused the warrant to contain *no address* at all – was such that the officer arguably could not be said to have acted "in objectively reasonable reliance on a subsequently invalidated warrant." *United States v. Leon*, 468 U.S. 897, 922 (1984). Nonetheless, the Eighth Circuit allowed the affidavit that had been submitted with the original warrant application to be used to demonstrate the good faith of the officers and upheld the search under *Leon*. In that instance, the court stressed that the application and affidavit both contained

the correct address; there was no evidence of bad faith on the part of the officers; the search was executed by the affiant; and the responsibility for the error should lie not with the officers but with the judge who issued the warrant. *See Curry*, 911 F.2d at 76-77. Each factor is established in this case as well, yet the Ninth Circuit reached the opposite decision on the constitutional issue. Respondents fail to dispel this direct conflict.

Moreover, in *Thomas* the Eighth Circuit recently reaffirmed its position on the good faith doctrine. There the warrant did not omit any address whatsoever; instead, it contained an incorrect address. Again, the underlying affidavit contained the correct information; the error was made by the officer who applied for the warrant; the affidavit did not accompany the warrant and was not referenced in it, and thus could not be used to cure the defect in particularity. In language that is directly applicable to the facts of this case, the court reached the same holding as before, reaffirming that "although no officer could have reasonably believed the warrant in *Curry* described the premises to be searched, the court upheld the search on the *Leon* objective good faith rule." *Thomas*, 263 F.3d at 808.

Indeed, in the *Thomas* case Judge Kyle dissented, adopting the same position that grounded the Ninth Circuit's holding in this case. He opined that the majority's approach would have the effect of "reading the particularity requirement out of the Fourth Amendment" because the officer had been the source of the clerical error and, had the officer "read the warrant *at any time* before [executing it,] the warrant's defect would have been obvious to him." *Id.* at 811. He thus could not see how the case could "fit within the *Leon* 'good faith' exception." *Id.* His argument was the precise basis for the ruling below in this case, and yet it was explicitly rejected by the Eighth Circuit. *See* Pet. App. 5a-7a & n.2. The circuit conflict is undeniable.

In the same vein, the Tenth Circuit also limits the "cure by affidavit" rule to those cases where the affidavit is specifically incorporated in or physically attached to a warrant. *See United States v. Dahlman*, 13 F.3d 1391, 1395 (10th Cir. 1993). In later cases, however, the Tenth Circuit has applied the "good

faith" doctrine to uphold the validity of searches where an affidavit not incorporated in or attached to a warrant is used to supply the lack of particularity, at least where the same officer both produced the affidavit and executed the warrant. *See United States v. Simpson*, 152 F.3d 1241, 1248 (10th Cir. 1998). In *Simpson*, indeed, the Tenth Circuit stated its holding as follows: "While his affidavit was not physically attached to the warrant nor specifically incorporated into the warrant, and thus cannot cure a lack of particularity, . . . the affidavit certainly supports the district court's conclusion that [the officer] in good faith believed he was obtaining a warrant to search [defendant's] residence as well as his person." *Id.* (citation omitted). Under this rule, of course, the Ninth Circuit must have reached the opposite result in this case. Yet respondents' sol comment is the lame observation that these cases are "factually dissimilar to the present case that authorized a search for a two story blue house." Opp. 10.

Respondents do suggest possible distinctions for some, but not all, of the case law from the Fifth Circuit. In *United States v. Cherna*, 184 F.3d 403 (1999), *cert. denied*, 529 U.S. 1065 (2000), the court's holding was diametrically opposed to the Ninth Circuit's approach, which it expressly disavowed. *See id.* at 413 (disapproving the Ninth Circuit's holding that if the "'affidavit does not accompany the warrant, agents cannot claim good faith reliance on the affidavit's contents'") (quoting *United States v. McGrew*, 122 F.3d 847, 850 (1997)). It is true that the warrant in *Cherna* contained attachments, though the underlying affidavit was not attached, and this distinction does not take the case outside the pertinent rule.

Moreover, in *United States v. Shugart*, 117 F.3d 838 (5th Cir.), *cert. denied*, 522 U.S. 976 (1997), the search warrant was challenged because it authorized a search for evidence of drug possession rather than evidence of drug manufacturing. The court held that it lacked particularity and that this defect could not be cured by referring to the underlying affidavit on which it was based, which was not incorporated in the warrant. *See id.* at 844. It nonetheless went on to consider the affidavit in upholding the search based on *Leon*'s good faith doctrine,

concluding that the case was controlled by this Court's holding in *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), the companion case to *Leon*. *See Shugart*, 117 F.3d at 845-46. That decision stands in direct conflict with the ruling below in this case.[2]

Finally, respondents do not dispute that the Third Circuit has joined the Ninth Circuit in resolving the underlying constitutional issue. In explicit reliance on *McGrew*, the Third Circuit has held that a lack of particularity in a search warrant cannot be cured by reference to underlying affidavits that have been placed under seal with the Court, without regard to the good faith doctrine. *See Bartholomew v. Pennsylvania*, 221 F.3d 425, 429 (3d Cir. 2000). In those circumstances, the court held, the warrant itself must contain a specific description of the items to be seized to avoid a violation of the Fourth Amendment, though it parted company with the Ninth Circuit on the qualified immunity issue. *See id.* at 429-30. Thus it cannot be said that the ruling below represents just an isolated or insubstantial conflict among the circuits.

Another important consideration here is that the approach taken by the Third and Ninth Circuits cannot be squared with the Court's precedents on the good faith doctrine in *Leon* and in *Sheppard*, which was the companion case to *Leon*. In *Sheppard*, as here, the plaintiff alleged a violation of his constitutional rights based on the Fourth Amendment. The specific complaint in *Sheppard* was that a warrant to search for controlled substances was insufficiently particular when the accompanying affidavit indicated that the affiant actually wished to search for evidence relating to a homicide investigation. It was undisputed that the issuing judge and the executing officers knew the contents of the affidavit and the focus of the search;

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[2] In *United States v. Beaumont*, 972 F.2d 553 (5th Cir. 1992), the affidavit was attached to the warrant, but the court held that the particularity requirement was not met and the good faith doctrine was invoked to uphold the validity of the search. The fact that the affidavit was attached to the warrant did not play a meaningful role in the Fifth Circuit's analysis, which again turned on the controlling precedent in *Sheppard*. *See id.* at 560-61.

indeed, the affiant had pointed out the discrepancy to the judge, who nonetheless approved the issuance of the warrant. *See Sheppard*, 468 U.S. at 985-86. On these facts, this Court concluded that the officers' good-faith reliance on the warrant was objectively reasonable, despite its acknowledged defects, because if the warrant had simply referenced the affidavit, it would have been clearly valid. *See id.* at 989-990 & n.7. The same is true in these circuit-court cases. Indeed, it is notable that *none* of the pertinent decisions from the Third or Ninth Circuits – *McGrew*, *Bartholomew*, and the ruling below – *ever discusses or even mentions* this Court's *Sheppard* decision. Their refusal to address this Court's controlling precedent is itself sufficient to justify either plenary review or summary reversal here. *See* S. Ct. R. 10(c).

There is also no doubt that the constitutional issue here is important. Many thousands of search warrants are obtained and executed throughout the country each day. Mistakes frequently occur, and when they do this Court has indicated that prior approval by a magistrate in the vast majority of instances should operate to validate the subsequent search where the officers have acted in good faith. At stake is the suppression of evidence in criminal trials and the immunity of law-enforcement officers in civil cases such as this one. Yet these conflicting decisions will prove dispositive on the same claims when they are brought in courts in different parts of the country, and the legal guidance available to such officials will remain murky and uncertain without the Court's intervention. In particular, the ruling below requires officers to second-guess judges who have approved warrants, upon pain of incurring personal liability for monetary damages and losing valuable evidence in criminal trials. That regime sharply undercuts the "good faith" doctrine that this Court established in the *Leon* and *Sheppard* decisions.

As a procedural matter, it bears repeating that the Fourth Amendment issue is cleanly presented here. In qualified immunity cases such as this, the constitutional issue would be decided first and may obviate any need to reach the qualified immunity issue at all. *See, e.g., Christopher v. Harbury*, 122 S. Ct. 2179 (2002) (resolving qualified immunity case by deciding

only constitutional due process issue); *County of Sacramento v. Lewis*, 523 U.S. at 833, 839-55 (1998) (same); *Wilson v. Layne*, 526 U.S. 603, 617 (1999) (resolving Fourth Amendment issue against officers but proceeding on to uphold their defense of qualified immunity). If the Court does not summarily reverse, therefore, it should grant *certiorari* to resolve the clear circuit conflict presented here on the underlying Fourth Amendment issue.

II. THE RULING BELOW DISREGARDS SETTLED PRINCIPLES OF QUALIFIED IMMUNITY AND DEPARTS FROM COURT PRECEDENT.

The Ninth Circuit, once again, has refused to apply the doctrine of qualified immunity that the Court has extended to federal and state officials. The Court has consistently held that government officials performing discretionary functions are immune from suit unless their conduct violates "clearly established" constitutional rights about which a reasonable person would have known at the time of the events in question. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). As this Court has defined the issue, "clearly established" law means that some controlling authority from the Supreme Court or the relevant lower court of last resort has already addressed the specific legal issue at stake. *See, e.g., Wilson*, 526 U.S. at 617.

Rather than define the legal test in this manner, the Ninth Circuit blurred the issue here by stating that "[l]aw enforcement officers are entitled to qualified immunity if they act reasonably under the circumstances." Pet. App. 7a. By thus misstating the proper test – and by failing to address the *Sheppard* case, which is the most prominent Court precedent to the contrary – the court below gave itself broad leeway to find petitioner liable simply for failing to "predict the future course of constitutional law," an approach that this Court has denounced. *Procunier v. Navarette*, 434 U.S. 555, 562 (1978).

This fundamental error is revealed in several different ways. Most obviously, the Ninth Circuit relied on its *McGrew* decision, which did not even issue until September 12, 1997 –

more than six months after the underlying events in this case had occurred on March 7, 1997. *See* Pet. App. 9a. At the time petitioner acted, the *only* judicial decision on point in the Ninth Circuit was the *District Court's* ruling in *McGrew*, which had *upheld the validity* of the challenged search in the course of upholding the defendant's criminal conviction. *See McGrew*, 122 F.3d at 848-49. Moreover, the line of Ninth Circuit decisions later cited in *McGrew* was quite tenuous on the constitutional issue. In both *United States v. Towne*, 997 F.2d 537, 549-550 & n.6 (9th Cir. 1993), and *United States v. Luk*, 859 F.2d 667, 676-77 & n.10 (9th Cir. 1988), the court had opened the door wide to application of the good faith doctrine in cases where search warrants were found to be insufficiently particular but underlying affidavits contained more information. Even *United States v. Kow*, 58 F.3d 423 (9th Cir. 1995), which respondents cite as having settled the issue, plainly failed to do so: in a footnote toward the end of that opinion, the court referred to its prior discussion in *Luk*, which suggested that "the failure to have a limiting affidavit present at the time of a search would not necessarily preclude a finding of good faith reliance." *See id.* at 430 n.4 (citing *Luk*, 859 F.2d at 677 n.10). All the Ninth Circuit said in *Kow*, however, was that this suggestion "may" not be "an accurate reflection of the current status of our law," and in the end the panel concluded that on the facts of the *Kow* case "we need not resolve any question regarding the application of the *Luk* footnote." *Id.* That hardly amounts to "clearly established" law.

In addition, in the ruling below the Ninth Circuit coined an entirely new doctrine of liability for law-enforcement officers in Fourth Amendment cases. Picking out "the leaders of the search team" for special responsibility, the court held that such leaders "must actually read the warrant and satisfy themselves that . . . it is not defective in some obvious way." Pet. App. 8a. *No prior case* had ever rendered such a holding. Indeed, the two prior Ninth Circuit cases cited for this proposition (*see id.* at 8a-9a) had held exactly to the contrary: (i) in *Guerra v. Sutton*, 783 F.2d 1371 (9th Cir. 1986), the court held that officers executing a warrant must "inquire as to the nature and

scope of the warrant," but stressed that "it was not necessary for all or even any of [them] to actually see the warrant," *id.* at 1375; and (ii) in *Marks v. Clarke*, 102 F.3d 1012 (9th Cir. 1996), the court noted that it had not found "any authority" supporting such a duty, and explicitly reversed the trial court's conclusion that "clearly established law imposed a duty on the officers, who had generally fulfilled their duty to become informed as to the scope of the warrant, to read or refer to the signed warrant." *Id.* at 1029-30. It would be especially perverse, therefore, to deny a defense of qualified immunity in a case such as this one, where the Ninth Circuit decided to make new law that departed from its own settled precedents.

Indeed, a close examination of the ruling below and the cases cited in the papers filed with this Court here reveals that at the time petitioner acted, no controlling decision and indeed no decision by *any* court *anywhere* in the country had ruled that his actions were unlawful. Only the later decisions by the Ninth Circuit in *McGrew* and in this case, and by the Third Circuit in *Bartholomew* (excepting its holding on qualified immunity), are now to the contrary. In this posture, the Ninth Circuit could not legitimately invalidate the defense of qualified immunity unless it ignored the legal framework that this Court has erected for evaluating such claims. *See, e.g., Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Wilson*, 526 U.S. at 617. Once again, officials lose the shield of qualified immunity only when the unconstitutionality of their conduct would have been apparent "in the light of pre-existing law." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). In this case, moreover, the merits of the underlying Fourth Amendment issues are not obvious, even today, to many judges who are vested with the authority to address them. *See supra* Part I.

Summary reversal is therefore warranted in this case to reaffirm that the qualified immunity standard "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 343, 341 (1986). And exerting such control is even more important where, as here, this particular lower court has so frequently departed from the Court's

precedents in this area. *See, e.g., Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (summary reversal of Ninth Circuit decision misapplying law on qualified immunity); *see also Hanlon v. Berger*, 526 U.S. 808, 810 (1999) (*per curiam* reversal of Ninth Circuit ruling to restore qualified immunity for law-enforcement officers); *Saucier*, 533 U.S. at 201 (reversing Ninth Circuit holding that erroneously denied qualified immunity); *cf. Lewis*, 523 U.S. 833 (1998) (reversing on substantive constitutional grounds Ninth Circuit holding that erroneously denied qualified immunity); *Behrens v. Pelletier*, 516 U.S. 299 (1996) (reversing on procedural grounds Ninth Circuit holding that erroneously denied qualified immunity). Further review of the ruling below, by one mechanism or another, is plainly justified here.

CONCLUSION

Petitioners respectfully request that the decision of the Ninth Circuit be summarily reversed or, in the alternative, the petition for a writ of *certiorari* be granted to review the merits of the Fourth Amendment and qualified immunity issues.

Respectfully submitted,

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February 2003